VIII

THE GENESIS OF CALIFORNIA'S FIRST CONSTITUTION (1846-49)

JOHNS HOPKINS UNIVERSITY STUDIES
IN
HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor

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THIRTEENTH SERIES

VIII

THE GENESIS OF CALIFORNIA'S FIRST CONSTITUTION (1846-49)

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BALTIMORE
THE JOHNS HOPKINS PRESS
PUBLISHED MONTHLY
AUGUST, 1895.

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JOHN MURPHY & CO., PRINTERS,
BALTIMORE.

PREFATORY NOTE.

This work is primarily a study in local constitution making. The vital relations to the whole country of many of the questions involved, however, have compelled attention to the national import of events and conditions having otherwise only provincial scope. The present study represents a more comprehensive monograph including a detailed account of the "Legal Status of California" from the American conquest to the adoption of the Constitution, which will perhaps appear in another connection. I am aware that there is a vast amount of literature on the early American history of California, and recognize the direct or indirect value of almost all of it: but comparatively little of it all is other than personal or merely popular, while much abounds with error. In studying existent constitutional conditions I have endeavored, following the excellent advice of Hon. Horace Davis, to "get into the feeling of the people:" in this endeavor contemporaneous literature, often wholly unscientific, has been of assistance. In presenting this work to the public I desire to make acknowledgments for suggestion or assistance to Hon. Horace Davis and Mr. T. H. Hittell, of San Francisco, W. J. Davis, Esq., of Sacramento, General John Bidwell (pioneer of '41), of Chico, and Professor H. B. Adams, of Baltimore; also to the several pioneers with whom I have conversed, especially Dr. Benj. Shurtleff and Mr. G. N. Cornwell, of Napa, California, Mr. Joseph Sims, of Sacramento, and Mr. J. L. Stieff, of Baltimore.

"O California, prodigal of gold,
Rich in the treasures of a wealth untold,
Not in thy bosom's secret store alone
Is all the wonder of thy greatness shown.
Within thy confines, happily combined,
The wealth of nature and the might of mind,
A wisdom eminent, a virtue sage,
Give loftier spirit to a sordid age."

—Title page California Notes, by C. B. Turrill.

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THE GENESIS OF CALIFORNIA'S FIRST CONSTITUTION (1846–49).

CHAPTER I.

Introduction.

The tenure by which the province of California was held to Mexico before the American conquest of the former was very slight. This fact afforded the greater temptation to other nations to obtain possession of this vast and desirable territory. Doubtless France and England, and perhaps Russia, had hopes of securing the prize. The government of the United States, also, ever since the explorations of Lewis and Clark in 1804, kept a jealous watch of the concerns of California. Whatever may have been the designs of interested nations, "California lay in the path of American empire," and the Monroe Doctrine stood as a menace to European aggression.[1]

The acquisition of the province of California by the United States was an act in the drama of the war with Mexico. It was a political act whose national import was fraught with tremendous significance. The dangerous, if not wholly unconstitutional,[2] policy of forcible annexation was begun by Andrew

[1] *Cf.* Willey, *Thirty Years in Cal.*, pp. 5–6; Schouler, *Hist.*, IV, 446.

[2] Mr. Jones, in Convention, declared: "A clear and plain clause of the [U. S.] Constitution, and the whole spirit of the Constitution, and the whole spirit of the Government of the United States, were violated when Texas was acquired, and when this country was conquered." Browne's *Debates in Cal. Convention*, p. 101.

Jackson in his scheme for Texas.[1] While war was pending with Mexico, the province of California was being jealously watched. San Francisco bay, as the President stated, seemed most desirable for our commerce; and Mexico was unsuccessfully urged to sell her western territory lying north of the thirty-seventh parallel.[2] In the fall of 1842, Commodore Jones, who had been cruising on the South American coast of the Pacific, was led to believe that Mexico had declared war on the United States. Forthwith he sailed to Monterey and astounded the commandant there by demanding immediate surrender. The conquest was premature. Scarcely had Commodore Jones issued his proclamation to the Californians announcing the conquest of the province, when he received advices convincing him of his error: thus he was compelled to restore the town to its former possessors, and to retire, with such grace as the circumstances would admit, to his ships.[3] Mexico naturally took alarm at this unseasonable occurrence.

Polk entered upon his administration with four great measures clearly set before him, one of which was the acquisition of California.[4] His first hope was to buy the province, but in any case its acquisition was firmly fixed in the President's purpose.[5]

In the meantime, the native Californians were far from content with the feeble yet despotic Mexican rule. The more intelligent of them foresaw that there must soon be some change of flags in their country, and General Vallejo headed a party who were for an independent republic, with the ultimate design of entering the American Union.[6] British interest and interference made it easily appear to American

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[1] *Cf.* Schouler, IV, 247. [2] *Ibid.*, IV, 253.

[3] Greenhow, *Hist. Oregon and Cal.*, 367–8.

[4] Letter of Geo. Bancroft to Schouler, quoted in Schouler, IV, 498.

[5] *Cf.* Schouler, IV, 534.

[6] Willey, *Thirty Years*, pp. 6–7; *cf.* Shuck, *Representative Men of Pacific*, p. 229.

officials as well as to native born Californians that England entertained serious intentions of securing possession of that territory, and served greatly to stimulate American aggression. The several hundreds of American immigrants stood ready to welcome and assist aggressions on the part of the United States.

The Mexican war was begun; and California was seized with a lofty contempt for the rights of native Californians. However ungracious or unrighteous the seizure of this country may have been, it proved a master stroke of policy, although eventually an extremely costly one. With the conquest itself, and with the national importance early attained by this Minerva of the Pacific,—severely testing the stability of our republic in its integrity,—this sketch cannot be primarily concerned. The question of slavery extension, which had become paramount in American politics, was the actuating cause in California's conquest, and the rock of offense upon which, through California's entreaties for admission, our Union well-nigh split. After the admission of Texas in 1845 there were twenty-eight States, in fifteen of which slavery existed; but after the admission of Iowa, in 1846, and of Wisconsin, in 1848, the slave States and the free States were numerically equal. That free States could be admitted only when accompanied by slave States seems to have been an admitted principle.[1] What disposition was to be made of rapidly developing California? Could slavery be rightfully introduced into this western country? If so, could slave labor be successfully employed under these unique conditions? These and related questions possessed an absorbing interest.

But slavery had been abolished in the republic of Mexico in 1829;[2] according to a recognized principle of international law, the institutions, rights, and laws of a conquered country remain in force until legally changed by the conquering government. At the moment of the American conquest,

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[1] *Cf.* Von Holst, *Hist.*, II, 139. [2] *Ibid.*, III, 392.

therefore, slavery did not exist in the Mexican province of California, and the express prohibitive law was an inherent obstacle at the threshold of the slavery extensionists' desire.[1] The admission of Iowa and Wisconsin having neutralized the advantage of the South in securing Texas, it was clearly perceived by Southern leaders that unless they obtained possession of this new territory, the fruits of the war with Mexico would be lost to them.[2] It was obvious that slavery could not be introduced into California without first meeting and settling the gravest difficulties. It was with great reluctance that the South became convinced that the spoils of the Mexican war must be divided, a common view being that the parallel of 36° 30′ would be extended to the Pacific.

Viewed from a local standpoint, many causes militated against the introduction of slavery. Geographical position was itself a safeguard. It was early observed that neither the soil, the climate, nor the production of any portion of California was adapted to slave labor, and that property in slaves would be utterly insecure in that country.[3] While many of the Southern settlers cared little about the question either one way or the other, those from the Northern States were generally opposed to this extension, not only on the moral principle that slavery is wrong, but also on grounds of local application and political expediency.[4] After the gold discovery, when citizens of all ranks became diggers, the introduction of slaves would have been far more vigorously opposed, although few then cared anything about slavery in the abstract, or greatly interested themselves in the Wilmot Proviso.

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[1] *Cf.* Rhodes, *Hist. U. S.*, I, 93-4; Von Holst, III, 392, *et seq.* See also letter of N. P. Trist to Secy. Buchanan, quoted in Von Holst, III, 334.

[2] *Cf.* Fitch, in *Century*, XL, 779.

[3] See Buchanan's letter, quoted in *Cal. Star*, Mar. 25, 1848.

[4] *Californian*, June 19, '47, March 15 and May 24, '48; *Cal. Star*, March 25, '48; *Alta California*, Feb. 22, '49. *Cf. Daily Evening Bulletin* [S. F.], May 23, '78, II, 1; *Sac. Record-Union*, Sept. 9, '84, I, 4; Colton, *Thirty Years in Cal.*, 374.

Mexicans were viewed with contempt by American citizens. It has always been true that powerful nations have had the weakness of encroaching, on occasion, upon races deemed to be inferior, and often of trampling, with no great scruple, upon technical justice for the sake of aggrandizement. But the native-born Californians were by no means wholly contemptible. The earliest American settlers in the territory of California held Mexicans as of little more consequence than Indians. The constant rumors about the establishment of an independent government there, or of other revolutionary movements, occasioned much talk on the part of the Californians about expelling the Americans, whose settlement in their province they viewed with manifest displeasure. On the other hand, the Americans were extremely suspicious, and wanted but a pretext in order to engage in acts of war, although in 1844 not over a hundred men could have been mustered into an army.[1] A change of temper, however, began to be observable before the American conquest; and it was not long after that event before native Californians came to be distinguished from Mexicans. The intelligence and refinement of many natives was admitted, and a friendly relationship sprang up between them and the Americans.[2] Most of the Hispano-Californians came to think of Mexico only as a foreign nation, and gradually they began to mingle with the Americans,[3] who, it was seen, were inevitably to become the predominant element in California. After the conquest was fully achieved, which, indeed, occasioned little real difficulty, the Californians, for the most part, readily acquiesced in the new régime, and their more enlightened leaders were treated by Americans with a high degree of respect and more than ordinary courtesy; seven of their

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[1] Bidwell (pioneer of '41), in *Overland Monthly*, XVI, 563–4; *cf.* O'Meara, *Ibid.*, XIV, 626.

[2] *Californian*, Nov. 17, 1847.

[3] *Cal. Star*, Apr. 1, 1848.

number were members of the Constitutional Convention,[1] in which they received marked attention.

The discovery of gold was an event of the very highest importance. California became El Dorado. The unsuited system of mongrel law, which had been feebly perpetuated from the Mexican dominion, was rendered virtually null by the sudden influx of wealth and a population so vast and varied, and the authorities were brought to "entire dependence upon the humor and caprice of the people."[2] Soldiers deserted, seamen left their vessels in the harbor, lawyers despised their fees, editors ceased their publications,—all to rush wildly to the mines.

The mania for gold gave an abnormal impulse to trade and commerce. San Francisco harbor was transformed into a forest of masts. The political confusion deepened, and causes for the Governor's solicitude multiplied; but the lawless element was not suffered to predominate, even the mining camps maintained strict regulations, and withal an enormous impetus was given to the movement for general organization.

The political and constitutional, as well as the social, conditions of territorial California were unique. Never were law and administration more needed: seldom has an enlightened community endured so inadequate a legal system and so precarious an administration. The early Californian leaders, Castro, Vallejo, and Pico, were too discreet to attempt an expulsion of the Americans after the conquest; and the Americans were not permitted to throw off the unsavory Mexican law. The persistent desire for admission into the federal Union was itself doubtless a bar to the much-needed local organization. The profound national significance of this new acquisition at a time when there was but one question in American politics is the key that must be constantly in the hand of the student who would gain a comprehensive view of the local, distracted situation. Slave extension created California: California effectually checked slave extension.

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[1] Their names are in Browne's *Debates in the Convention*, 478–9.

[2] McGowan and Co's. Guide-book, "California" [1850], 158.

CHAPTER II.

Desire for Organized Government, and Congressional Failure.

The earliest American settlers of California went to that country as a province of Mexico under Mexican law. As adopted citizens of Mexico, therefore, they were living under Mexican law at the time when the territory was taken possession of by the United States forces in 1846: thus, speaking technically, they could claim no other rights than such as are allowed, under the laws of nations, to a conquered people. But these same settlers, who were really loyal Americans, were placed in a unique position inasmuch as about nine-tenths of the army which conquered the country was composed of their own numbers. As foreigners residing in a province of Mexico, they had united for self-defense and had tendered their services to Captain Frémont, the only United States officer then in California.[1] In reality, therefore, the American portion of the inhabitants were the conquerors and not the conquered. The acquisition of California by some means had been the fixed policy of the administration at Washington: whether wisely or unwisely, the American inhabitants of the territory were a most powerful agency in the conquest. They

[1] See an interesting editorial on "Military Despotism" in the *Californian*, June 5, 1847. It recognized that on technical grounds the American inhabitants might be considered part of a conquered people, but urged that some allowance should be made in the unique situation, and that the Americans should at least "have all the advantages which can be afforded by a military government."

ardently desired to see California a Territory of the United States, and ultimately a member of the Union.[1]

The population of California in the summer of 1846, exclusive of Indians, was estimated at about 10,000; and probably less than one-fifth of that number were foreigners. These latter, however, most of whom were from the United States, had been rapidly increasing by immigration, while the natives were increasing very slowly, or not at all. It became more and more evident that the very institutions of the country must suffer radical changes. To resist these changes and prevent the filling up of the country with foreigners, some steps were taken by a few native Californians: but Mexico has been severely censured for her disregard and utter neglect of her province on the appearance of United States forces.[2] She was charged with great stupidity and weak cowardliness. For the American inhabitants to resist changes which would plainly and inevitably lead to the introduction of their own loved institutions were utterly unnatural and not for a moment to be expected.[3] But on the other hand, the rapid extension of American political principles and the speedy establishment of American civil institutions were eagerly desired: it will be the purpose of this chapter to inquire into the reality and intensity of this desire for an organized form of government previous to the adoption of the State Constitution in 1849—a period having a most vital influence on the subsequent history of the great State of California. Argument is not needed here to show that the Mexican provincial government was in itself ill-adapted to the needs of the rapidly increasing aggressive American population, and quite unsuited to their taste and temperament. In short, the

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[1] *Californian*, Jan. 28, 1847.

[2] See *Californian*, Aug. 22, and Sept. 5, 1846.

[3] For years before the American conquest the foreigners in California would have welcomed a change from the feeble Mexican régime to a strong, permanent government under the U. S.—Bidwell, *Overland Monthly*, XVI, 564; private MS.

American inhabitants of California would be satisfied with nothing but some adequate form of American government, and for this a clamor was set up almost immediately at the conquest, which did not entirely cease until California was fully received into the American Union in 1850.

The American conquest, an episode in the war with Mexico, left California in the power of United States forces as a temporary military possession.[1] According to a familiar principle of international law the customs and usages existing at the time of the conquest were proclaimed to continue in existence under the military rule, until some other government should be provided by competent authority. But no effectual measures were employed to perpetuate even the Mexican civil law, itself entirely inadequate under the new conditions; hence California had no suitable, properly constituted system of government from the conquest to the adoption of the Constitution.

The first number of California's first newspaper[2] urges the establishment of a colonial government whose legislature should elect a delegate to proceed to Washington and claim formal recognition for the Territory of California, and a seat in Congress. Likewise the *California Star* early[3] urged the calling of a convention to form a constitution for the Territory. These expressions—reflections of wide-spread popular opinion and desire,—found their justification in the unsatisfactory existing order of things and in a vague sense of Anglo-Saxon freedom and American self-government, rather than in legal and constitutional grounds.

It will be remembered that the conquest of California was not completed until the fall of 1846, and that there was serious revolt still later. Conservative Commodore Sloat was suc-

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[1] I here give substantially the view of the President. For other views, and references to the discussion, see Bancroft, V, Ch. XXII., especially p. 602, n. 21.

[2] *Californian*, August 15, 1846. [3] February 13, 1847.

ceeded by aggressive Commodore Stockton, who immediately took steps to complete the conquest. Stockton's bold proclamations, issued from Monterey on July 28, and from Los Angeles on August 15–22, are in strong contrast to Sloat's moderate but skillfully-drawn proclamation of July 7.[1] Sloat had assumed, without sufficient warrant, that California was to be permanently a Territory of the United States and that its peaceful inhabitants were to "enjoy the same rights and privileges as the citizens of any other portion of that territory." Californians of all classes received this proclamation most favorably, for it was friendly in its tone, and it held out the promise of good permanent government. Stockton, moved by "daily reports from the interior of scenes of rapine, blood, and murder," proclaimed that he would not confine his operations "to the quiet and undisturbed possession of the defenceless ports of Monterey and San Francisco;" but declared his intention of marching "against these boasting and abusive chiefs" of the interior and of the south. That his language was highly colored by imagination is evident from the fact that the conquest was completed without a single battle, and that no enemy was seen.[2] Los Angeles was taken without resistance, and from that point Stockton issued, August 17, an important proclamation, declaring California entirely free from Mexican dominion and affirming that so soon as circumstances might permit, the Territory would be governed "by officers and laws, similar to those by which the other Territories of the United States are regulated and protected."

No one in 1846 could possibly have foretold the actual status of the territory of California for a single year; much less could one have divined the vicissitudes and unparalleled conditions of the three years preceding the adoption of the

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[1] Sloat's proclamation is in Bancroft, V, 234–7; Stockton's proclamation of July 28 is in Annals of S. F., 103–4; his important one of August 17, is in *California Star*, January 7, '49.

[2] Bidwell, in *Century*, LXI, 523.

Constitution. During Sloat's brief rule there was little cause for anxiety. He had come as a friend, and had promised a permanent government. Stockton came as an intimidating conqueror: he held out the hope of an organized Territorial government as soon as circumstances would admit of such, but declared *ad interim* strict martial law, permitting the people, to be sure, to elect the civil officers of their towns and "to administer the laws according to the former usages of the Territory." It was precisely this military rule, continued with some modifications until the ratification of peace with Mexico, that evoked repeated expressions of increasing dissatisfaction and of growing desire for organized civil government. The American population of California during 1846 and 1847 was very small, widely scattered, and altogether in a position extremely disadvantageous for efficient, united political action of any kind. But it had become evident to the settlers that the country was destined to be permanently American; and it is not surprising that a clamor began to arise for American laws and institutions, and that expressions of dissatisfaction with the impotent Mexican government and seemingly harsh military rule grew louder and louder. It cannot be charged to the discredit of the early settlers that they thus manifested dissatisfaction with the existing order of things, and evinced an earnest and persistent desire for organized government. They were, for most part, honest, energetic, and intelligent pioneers who had been accustomed to law and order. California being no longer under the corrupt and despotic rule of Mexico, they were not unreasonable in expecting better things from the United States. But their greatest grievance was the very want of law adequate to the protection of life and property, and to the complete administration of justice.[1] As the population increased, causes for disaffection multiplied. Those Americans who had lived under the Mexican régime had

[1] *Cal. Star*, Jan. 9, 1847, and *passim*; *Californian*, *passim*, etc.

learned to accommodate themselves measurably to the existing conditions and to the use of the Spanish language: but in proportion as the American population increased after the conquest, and gradually gained the ascendency of numbers, it was unreasonable to expect the new comers to adapt themselves to the effete Mexican laws, at best only partially perpetuated and imperfectly administered, and laboriously to acquire mastery of a language plainly and speedily being superseded by their own English.

Before Commodore Stockton had established a civil government in California,[1] General Kearny superseded him. Kearny's proclamation of March 1, 1847, gave hope of the early establishment of a free Territorial government, and virtually promised that the people would soon "be called upon to exercise their rights as freemen in electing their own Representatives to make such laws as may be deemed best for their interest and welfare."[2] Thus the people were again stirred to hopefulness and urged on in the chase after the phantom of Territorial organization, destined ever to elude their grasp. The establishment of a civil government at that time would have been welcomed with keen satisfaction, and would have had, it was believed, "a most salutary effect, whatever difficulties may have occurred during the military occupation."[3]

But the desired government was not established under Kearny's rule. By the time that he was succeeded by Colonel Mason,[4] many persons had begun to think that there were actually no laws in force "but the divine law and the

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[1] Stockton had prepared a plan for civil government, which, however, was never put in full operation. For the projected system see Cutts' *Conquest*, 121–125. In his report Stockton assumed that the change from military to civil rule naturally and necessarily followed the conquest of the country. See *Report*, 40, cited by Bancroft, V, 285. Hittell says the plan of government was issued and promulgated. *Hist. Cal.*, II, 586.

[2] This proclamation is in the *Californian*, Mar. 6, '47.

[3] *Californian*, Mar. 13, 1847. [4] May 31, 1847.

law of nature:" the "former usages," whose existence had been proclaimed, had become so intangible and evanescent as to lead the editor of the *Star* to acknowledge his inability to discover the whereabouts of any general written laws whatever.[1] "Lex," in the *Californian*, calls to the attention of Governor Mason the fact that "nothing has as yet been done to maintain 'the authority and efficiency of the laws;' nearly five months have elapsed since this [Kearny's] declaration was made, and yet not one single law has been enacted to meet the necessity of any case; and in order to enable the authorities to give efficiency to the law, not one single law, *supposed to exist* in the territory, enacted by the legislature of Mexico, or by the junta of this [San Francisco] department, has yet been defined."[2]

Congress had been busy with the great concerns of the war with Mexico: all early negotiations had failed of peaceful issue. While a keen interest in the acquisition of California was already manifest in Washington, Congress could hardly be expected at this early stage, while war was yet in progress, to mature plans for the permanent Territorial organization of the conquered country: and it did, in fact, adjourn on March 3, 1847, having made no provision for the government of California.

Colonel Mason came with full power to establish a temporary civil government in California,[3] and immediately began studying the existing conditions and formulating the Mexican laws believed to be in force. Before the designs of Governor Mason had become generally known, the law-loving settlers, disappointed in their hope of civil organization under Kearny, grew more clamorous in the expression of their desires under the new executive. The feeling that they had been grievously wronged, if not wilfully deceived, began to take hold of them

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[1] *Cal. Star*, Mar. 27, 1847. [2] *Californian*, July 17, 1847.
[3] See instructions, Cal. Mess. and Cor., 244–5.

in earnest.[1] The expectation of tidings of peace and of a scheme for civil government from Washington doubtless influenced Mason to delay his own plans, or entirely to relinquish them.[2] This relinquishment was a sore disappointment to the agitators for organization, for they had been led to believe that the Governor had actually commenced work on his civil organization, which, had it been executed, "California may be considered as fairly set out on the road to prosperity and greatness:"[3] but they were brought to an attitude of hopefulness by the sanguine expectation of Mason that peace was at hand, and that a communication from Washington would early gratify their desire. And besides, Congress was in session, and would presumably provide for this important province.

All these hopes proved unfounded, and the clamor for civil government was vigorously renewed.[4] Mason's code was

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[1] See the long and impassioned editorial on "Civil Organization," in the *Californian*, January 5, 1848. I quote briefly: "In view of our civil rights, in view of the security of person and property, in view of all the sacred rights and privileges secured to us by the fundamental laws of our government, we must say that we have acquired nothing, but have lost everything. . . . We know nothing of the design of the present Executive, in reference to the organization of a civil government; but we do know that the people very much desire such organization. . . . Our Executive being fully aware that the people are extremely anxious that a civil government should take place, that our government *wishes to provide* a government for us *with the least possible delay*, . . . we cannot doubt, even for a moment, but that the most sanguine expectations of the people will soon be realized." *Cf.* Address of J. R. Browne, in *First Annual of Ty'l. Pioneers of California*, 55.

[2] *Californian*, May 3, '48.

[3] *Ibid.*, April 26, '48; *California Star*, April 22.

[4] I quote from an interesting but somewhat erratic editorial in the *Californian*, December 29, 1847. "The subject of a civil organization seems now to agitate the public mind throughout the entire territory. . . . Our citizens are everywhere, with the greatest imaginable solicitude and entheusiasm, inquiring why it is that they are thus neglected. . . . They say that they are American citizens, and they are. They say that they, too, are entitled to the sacred privileges and immunities guaranteed to us by irrevocable, constitutional law, and they are. . . . Wherever we go, the

never published;[1] tidings of peace did not arrive for several months; and the violent debates of Congress ended at a late date without legislation. Before the opening of the session in December President Polk had satisfied himself that the province of California should never be surrendered, and hence that the civil jurisdiction and laws of the United States should be extended over it. He therefore in his annual message had recommended the establishment of a "stable, responsible, and free government" over the Californias and New Mexico. "I invite the early and favorable consideration of Congress to this important subject," he had said;[2] but Congress, in a session which lasted more than eight months, failed to consider it effectually.

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serious and destructive defects of our government are the chief topics of conversation. . . . That the people are extremely desirous of an organization, must be apparent to every officer in the territory, who has upon any occasion condescended to hear a suggestion from that source. . . . But what the people desire, what we, as good and loyal citizens, are entitled to, what the United States '*wish and design*,' what the President unequivocally sanctions and approves, and what natural right demands, is some kind of a government, which will, at least, render life, person, and property secure. Whether temporary or permanent, it matters not, but we hope that a government will at once be organized fully adequate to the purposes for which it is designed, and at least, coexistent with the evils which it is designed to remove."

[1] *Alta California*, June 14, 1849; *Californian*, August 14, 1848. Bancroft says that Mason "formally promulgated a code printed in English and Spanish," citing only the article in the *Californian* which mentions the fact that the code was *printed*. History VI, 263. The *Alta*, however, definitely states that while the code was printed, in consequence of the news of peace "Governor Mason never published nor attempted to enforce those laws;" and continues: "we have shown that since the peace the government abandoned its design of promulgating a code of laws based upon the Mexican law, even after those laws were printed and partially bound." Gen. Bidwell writes in a private letter: "In regard to 'Mason's Code:' if it was ever promulgated I never heard of it. That it was printed and circulated without my hearing of it I can scarcely credit." It was July, 1849, when General Riley caused to be published "such portions of the Mexican Laws . . . as are supposed to be still in force and adapted to the present condition of California." Browne's Debates, *Appendix*.

[2] *App. to Cong. Globe*, XVIII, 3.

In the meantime an event of the profoundest significance had happened. Gold had been discovered. The news was being disseminated; the tide of immigration had begun. The already growing desire for organized government was greatly accelerated.[1] The need was almost infinitely increased, and better administration of justice seemed to be absolutely imperative.[2] Could honest Americans hope longer for the promised civil organization from Washington, or should they themselves take the initiative?[3]

The first excitement of the gold discovery had not yet died away, nor, indeed, had the immigrants begun to arrive in very large numbers, when tidings of peace with Mexico reached Governor Mason.[4] No one could doubt that California was a permanent part of the United States. Here, then, was the message which had been so long awaited by Mason and which legally put an end to military rule. The tidings were taken by the citizens as an omen of generally diffused benefit and the opening of the brightest possible prospect.[5] Unfortunately no scheme for legal Territorial government accompanied the tidings of peace: instead of passing from military rule, under which the people had grown so restive, to a permanent and satisfactory form of civil government, California passed, without perceptible change, into a period of mere *de facto* government, more popularly known as the No-Government period.

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[1] Bidwell, Private MS., 5.

[2] It is thought unnecessary to point out in detail the unique and precarious conditions imposed by the immigration of the gold-hunters. They are among the most familiar facts of California history.

[3] See editorial in *Cal. Star*, May 20, 1848, from which I quote: "The people of this territory have been induced from the first hour of its occupation by the forces of the United States to believe a territorial government would be early granted, that the welcome boon of a wise administration of wholesome laws, was a prize already within their grasp. . . . The people of this territory are now awaiting the promised administration of decisive law. They require it—they expect it, and to it they are entitled."

[4] Aug. 6, '48.

[5] *Californian*, Aug. 14, 1848.

At this critical stage there was among lovers of law and order genuine and widespread solicitude for California's future. Colonel Mason fully appreciated the delicacy of the situation, and used his best efforts to conciliate all parties; but what could he do now but await the arrival of the *St. Mary's*, sloop-of-war, with the long-expected Territorial government? After conference with Commodore Jones, he decided that in default of Congressional action he would immediately recommend "the appointment of Delegates by the people, to frame laws, and make other necessary arrangements for a Provisional Government for California."[1] The *Californian* had despaired of Congressional action. It had said: "Months, and perhaps years, will elapse before the national legislature will arrive at a harmonious conclusion of a territorial government for California. The much vexed subject of slavery . . . will prove an insuperable barrier to dispatch."[2] But Mason, careful perhaps to a fault not to exceed his instructions, waited for news from Washington. The *St. Mary's* arrived with the news of Congressional failure, and the question of a regular Territorial government for California was believed to be settled,[3] although the subsequent Congress was yet to be the scene of many a tempestuous discussion and violent conflict—all to terminate, once more, in dogged dead-lock.

The leaders of popular thought now believed that the people might set out, with none to hinder, to prepare for themselves a provisional government. "The cause is urgent and the times admit of no delay."[4] It was hoped that every true American citizen would lend hand and influence in rearing and supporting a wise government.[5] That this belief took firm hold on the popular American mind is evidenced by tokens

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[1] *Star and Californian*, Nov. 25, 1848.
[2] Oct. 21, 1848.
[3] *Star and Californian*, Dec. 16, 1848.
[4] *Ibid.*
[5] On the difficulty of securing deliberate action from those migratory strangers, see Willey, in *Overland Mo.*, IX, 14.

not to be mistaken. On December 11, the citizens of San José met "for the purpose of taking into consideration the propriety of establishing a Provisional Territorial Government, for the better protection of life and property" until the United States should extend its protection by furnishing government and laws for California. Resolutions of a temperate and judicial character were adopted, recommending that delegates from the several districts be sent to a general convention in that pueblo at an early date.[1] Similar provisional government meetings were held in San Francisco, Sacramento, Monterey, and Sonoma.[2] These large and usually unanimous meetings may be considered a fair index of the feeling of the principal communities of the entire territory.[3] The subject engaged the serious thought of the ablest minds. Mere mention of the names of a few leaders will be sufficient to indicate that the movement was neither sporadic nor irrational, much less disloyal and revolutionary. Burnett, Norton, Colton, Botts, Lippitt are some of those who took the initiative in this movement towards a provisional government. These preliminary movements were clearly not dictated by political faction, nor had they any connection with instructions from Washington:[4] they were without doubt the honest expression of the best popular feeling. "There were no partisans in the matter, where there was only one great party and that included the whole thinking population."[5]

Popular progress toward organization was uninterrupted for several months. The citizens of San Francisco created

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[1] See report of meeting and resolutions in full in *Star and Californian*, Dec. 16 and 23, 1848. These and succeeding contemporaneous reports are both interesting and important as reflecting widespread and really intelligent opinion.

[2] For contemporaneous accounts of these meetings, consult: *Star and Californian*, as above; *Placer Times*, July 9; and *Alta California*, Jan. 25, Feb. 22, Mar. 22, 1849; etc.

[3] *Cf. Alta California*, Jan. 4, 1849; Annals of S. F., 135–6.

[4] Colton, *Three Years in Cal.*, 373. [5] Annals of S. F., 136–7.

for the temporary government of that district the so-called Legislative Assembly of fifteen members. Mason, as *de facto* governor, did not see fit to interfere with these popularly initiated movements. Similarly, General Smith, Mason's military successor, while not formally recognizing the legal existence of the San Francisco Legislative Assembly, did not actively interfere with its government nor with the general organizing tendency.

The district of San Francisco came to have a commanding influence in this movement: yet there was by no means that coherency and singleness of purpose in respect of detail that was needful for dispatch. Moreover, local conditions, especially the difficulty of communication and travel in that notable winter, were forbidding, and interposed delay. Nevertheless the leading American citizens in California held to the one great purpose of organized government with remarkable persistence. Undaunted by difficulty, they proceeded with growing confidence in working out for themselves the great problem, and seemed to be almost within sight of success, when unlooked-for events called for readjustment of program.

In the spring of 1849 General Riley superseded Colonel Mason as *de facto* governor of California. He recognized the grave difficulty of undertaking to administer the civil affairs in a province which was neither a State nor an organized Territory: he desired to keep the military authority, so intolerable to the people, as perfectly hid from view as possible. While the undisputed fact of his military authority was itself offensive to leading settlers, they denied that he possessed any civil authority whatever. But as chief executive of the province, he must needs act in civil capacity: hence arose the controversial conflict between *de facto* (or *ex-officio*) Governor and people. While General Riley awaited the final news from Congress, the people of the several districts proceeded, with characteristic American regularity, in their arrangements for a civil government proceeding from their own initiative.

But what of Congress now? The short session had begun December 4, 1848, and ended March 3, 1849. President Polk had again referred to the subject of California's needs, this time affirming that the condition of the country imperatively demanded the immediate organization of a Territorial government.[1] To be sure, the very limited power of the executive had continued to be exercised; but the only government that remained after the conclusion of peace with Mexico was that established by military authority during the war, now a mere *de facto* government at best, resting on the presumed consent of the inhabitants. In view of the extraordinary exigencies of the case, Polk was most urgent in warning Congress to provide legal organization. But the same national difficulties which had blocked action at the last session proved too great to be overcome now. Indeed, the consideration of the territorial condition of California was not fairly begun in the Senate until late in February, 1849, when Walker introduced his amendment to the general appropriation bill.[2] Then followed an extended constitutional debate in which Webster and Calhoun figured as leaders.[3] After great display of dialectics Walker's amendment in a modified form passed the Senate by a close vote, on February 26. This would extend the Constitution of the United States over the newly acquired territory west of the Rio Grande, and give the President authority "to prescribe and establish all power and useful regulations in conformity with the Constitution," and to alter the same at his discretion as circumstances demanded. On the following day the House passed a territorial bill excluding slavery from the new Territories. Walker's amendment was defeated in the House, and the

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[1] Ex. Doc. 2 S., 30 C., H. R. I., 12; *cf.* Hittell, II, 701–2.

[2] *Cf.* Von Holst, III, 443 *et seq.*

[3] For Webster's opinion as to the proper course to pursue, see Curtis, Webster, II, 353, 362–4. Calhoun's views are set forth in his Works, IV, 535–541.

House bill was killed in the Senate Committee. A joint committee reported its inability to unite upon any plan. The last session of the Congress came; the debate continued far beyond midnight. The stormy scenes of the Senate chamber on that last night of the Thirtieth Congress have perhaps never been equalled in the annals of American legislation.[1] It was nearly four in the morning when Webster succeeded in securing a vote on the motion to drop Walker's amendment. The motion once adopted, the appropriation bill quickly passed both Houses, and Congress adjourned having failed to make any provision concerning the new territories. The troublesome subject was thus left for a new Congress and a new administration.[2]

Immediately on learning that Congress had the third time failed to make provision for the government of California, General Riley asserted his civil authority in a most emphatic manner by issuing a call for a general Constitutional Convention,[3] and by proclaiming the so-called Legislative Assembly of San Francisco, the head and front of the settlers' movement, to be an illegal and unauthorized body.[4] The Assembly, on its part, protested against Riley's intervention, and reasserted what it believed to be its undoubted right; *viz.*, the right of self-government, in default of suitable government by the United States. The issue was sharply defined; but the citizens were too much in earnest in their desire for efficient government to allow themselves haughtily to stand out against the *de facto* Governor and hold themselves aloof from his really practicable measures just announced: therefore they were not long in acceding to his time and place for the Convention, although their leaders did hold to the last that while Riley,

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[1] *Cf.* Von Holst, III, 454; Fitch, *Century*, XL, 784; Willey, *Ov. Mo.*, IX, 14.

[2] *Cf.* Schouler, V, 119.

[3] Cal. Mess. and Cor., 776–780: dated June 3, '49.

[4] *Ibid.*, 773–4: dated June 4.

as any other person, had power to suggest or recommend, he had no power to appoint or command. Had the settlers cared less about the government of their province and more about carrying a point of law—which is indeed perplexing enough, but which they thoroughly believed in[1]—their real end would doubtless have been defeated, and their mild revolution would have taken on the serious aspect of open defiance. Fortunately they were not sticklers for what was after all a technicality. If there were those who wished to maintain their position at all costs, the ardent desire of that overwhelming class of hard-headed Americans whose one aim was paramount, the means subordinate, proved a sufficient corrective. The pressing need of government and desire for it, the personal respect which General Riley commanded, and the patent practicability of his plans overruled objections, united parties, and gave the key to ultimate success.

Why this intense and persistent desire for organized government in California? Why not be content in that wildly exciting and highly dramatic period with the very wildness and drama? Had not those argonauts left restraint and law and conventionality that they might enjoy weird freedom?

The population of California had increased from about 10,000 in the summer of 1846 to 26,000 at the beginning of 1849, and to 50,000, by the first of August of the same year.[2] The first census, that of 1850, showed a total population of 92,597, or an industrial population of 77,631: of these, mining gave direct employment to 74 per cent., while many others were indirectly dependent on mining. A mere recital of the most familiar facts regarding the increase and character of population is sufficient evidence, *a priori*, of the need of adequate and suitable government. The need was sorely felt, and the highly unsatisfactory condition of affairs was impa-

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[1] Burnett, *Recollections and Opinions*, 331–2.

[2] *Californian*, Aug. 22, 1846; Vassault, *Overland Monthly*, XVI, 287 *et seq.*

tiently declaimed against. The military executives and the national administration recognized the need no less than did the people, but virtually confessed themselves powerless to satisfy the demands of the anomalous conditions. While many of the radical settlers were passionate in their utterances, and often unwarranted in their denunciation of officials, even the most conservative admitted that "something ought to be done towards developing a civil organization of government."[1] The feeble attempt to retain in force the old Mexican laws, as might be expected, had ended in almost complete failure. Apart from the fact that these laws were rendered inapplicable under the changed conditions, the Americans, who were to be governed by them, and the authorities, who were to administer them, were alike totally ignorant or comparatively unfamiliar with them.[2] California had been conquered by Americans: the immigration of settlers now made Upper California an American community. To engraft the semi-barbaric Mexican system of law upon such a community would be utterly opposed to the American spirit and sure of partial failure: yet even such an engraftment was never fully made, nor scarcely rationally attempted.

Again, there was no recognized legal system of taxation for governmental support. Congress extended the United States revenue laws over California, with San Francisco as a port of entry, but provided no legal government: hence there were loud protests against the imposition of a system of taxation not only without representation of the people, but, so far as Congress was concerned, without any government at all.[3]

A most potent cause of anxiety for new government was the feeling, fostered by promise and flattery, that the existing unsatisfactory arrangement was merely temporary, and that either through Congress, or the administrative authorities, or

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[1] See *Californian*, Jan.–Feb., '48.

[2] *Cf.* Vassault, *Overland Monthly*, XVI, 288–9; Bidwell, Private MS., 3.

[3] See address of S. F. Assembly, *Alta Cal.*, June 14, 1849.

popular action, organization would soon be an accomplished fact. Thus the people were exasperated by Congressional delay; they wearied of governors' promises and hopes which repeatedly proved unfounded; and yet they lacked facilities themselves for early concert of action. They were still left, according to extravagant "Pacific," "after two years of anarchy, precisely as [they] stood at the start,—sans law, sans order, sans government."

Admitting the complaints to have been often unwarranted and sometimes wholly irrational, it is yet clear that at no time after the conquest were person and property sufficiently protected.[1] But the supreme need arose after the immigration of the gold hunters had set in. The immigrants previous to the gold excitement had for most part come to California to settle permanently. They were a set of honest, sturdy American pioneers, whose native capacity to improvise and adapt served them well in many a unique relation. But now came a heterogeneous tide of adventurers and speculators from all lands, not one-tenth of whom expected to dwell permanenly in California.[2] The gaming table became a breeding place for drunkenness and crime of every sort. San Francisco was for a time terrorized and almost dominated by an irresponsible organization known as the Hounds, who afterwards styled themselves Regulators. Law was wanting, justice was defeated, and villainy became temporarily rampant. But the peace-loving citizens of San Francisco vindicated promptly and with a strong hand their integrity and their honor; and in their summary defense of justice, they forshadowed the stern régime of the California Vigilance Committees.[3]

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[1] The editor of the *Californian*, December 29, 1847, by no means the most passionate writer of the day, employs this rhetorical period: "Crime, rapine, and inhumanity, stalk abroad throughout the land, unchecked and unawed. Murder is committed here. and manslaughter there; to-day we hear of theft and robbery, and to-night of burglary, rape, and arson."

[2] Dr. Benjamin Shurtleff fixes the proportion at not more than 3 per cent.

[3] See Bancroft, Popular Tribunals, I, on the Hounds, the Regulators, etc.

It could no longer be said that the desire for organized government was universal: indeed, the great majority of these later pioneers cared little or nothing about general laws or a civil government,—they came seeking gold. But, as already pointed out, the desire for government and the preliminary movements in that direction on the part of those most solicitous for California's welfare grew with the gravity of the situation. Not a few of the new comers patriotically joined the advocates of a more effective rule; and among those Americans who gave the subject any just consideration, there seemed to be no dissenting voice.

The sudden appearance of a large lawless element and the consequent increase of crime and added insecurity gave adhesiveness to the law-loving citizens, demonstrated the inadequacy of existing institutions, and intensified the desire for a new régime, a régime which could be inaugurated only by a General Convention and thorough organization. The popular movement towards a civil government, the magnanimous acquiescence in the plans of General Riley, and finally, the Convention itself,[1] held at a time when fortunes were being made in a day, furnish most unimpeachable evidence of the long existence, the continuity, and the intensity of the popular desire for organized government. The exciting scenes and anomalous conditions of California were the comment of the nations: the desire for government was universally known.[2]

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[1] A perusal of the debates of the Convention will reveal the sentiment of citizens reflected by delegates. For example, see Gwin's remark, p. 198. "We all know that we ought to have had a government; that such a case never existed before in the history of any Government, that such a great country as this should have been neglected as it has been." Report of Ways and Means Committee, p. 201: "No portion of the Territory of the United States ever more needed the paternal care of a Territorial Government. We are without public buildings, court houses, jails, roads, bridges, or any works of internal improvement." Tefft's remarks, 366, &c.

[2] See Snyder's remark in Convention, Debates, 182: "We have been waiting anxiously for a long time for a government. It is well known, sir. All over the world is it known. And never has the world presented such a picture; a people at peace with nations, occupying a proud and lofty position, an integral part of the great American Union, without a civil government."

CHAPTER III.

The Constitutional Convention.

General Riley's proclamation set apart the first day of August, 1849, for the election of delegates to a general Convention which should form a State Constitution or a plan for Territorial government. The Convention was to meet on the first of September, in the town of Monterey, California's early capital. To the Spanish population of the south the proclamation was comparatively unintelligible; the people of San Francisco inclined at first to dispute Riley's right to issue the call; and the miners at the north could hardly be supposed to interest themselves in political or civil affairs.[1] But the necessity for organization was patent, and the desire for better government was strong: this opportunity for a consummation was not to be neglected. General Riley, General Smith, and Thomas Butler King stimulated the people by every means to hold preparatory meetings. In some districts scarcely any steps were taken until a few days before the election, but for most part the efforts were successful.[2] The prospect for success, at first doubtful, improved as election day drew near. The native Californians showed unexpected cordiality of sentiment. San Francisco laid reluctance aside, and even the miners began casting about for suitable candidates.[3] The amount of interest actually taken had not been anticipated.

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[1] Willey, *Constitutional Convention in Monterey;* also in *Overland Monthly*, IX, 14.

[2] *Cf.* Frost, *Hist. of Cal.*, 124. [3] Willey, *Constitutional Convention.*

The election of delegates proceeded, with fair regularity, on the day appointed. In one or two instances the election was not held on the day appointed, although the delegates were nevertheless admitted.[1] The delegates were elected by the scheming of no political parties nor combination of interests: competent men were sought.[2] On Saturday, September 1, the members elect were generally in Monterey, ready for business.

The Convention[3] proceeded to organize on Monday, September 3. The meeting place was the upper story of a spacious building of yellow sandstone, known as Colton Hall, perhaps the only building in California well suited to the purpose.[4] Kimball H. Dimmick had been appointed Chairman, *pro tempore*, and Henry A. Tefft, Secretary, *pro tempore*. The first question was on the eligibility of delegates to seats in the Convention and the apportionment of representation in the several districts.[5] The greater part of two days was consumed in arriving at a satisfactory adjustment: forty-eight delegates were at length accounted regular members of the Convention.

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[1] Browne's *Deb.*, 8; *cf.* Frost, 124

[2] Ex. Doc., 1 S., 31 C., H. R., VIII, 59, pp. 1–6; *cf.* Willey, *op. cit.*

[3] The one essential source for proceedings of the Convention is Browne's *Debates in the Convention.* The *Alta California* has copious reports beginning with Sept. 13. These are from the pen of Edw. Gilbert, editor of the paper. Taylor's *Eldorado* is also an excellent source.

[4] Taylor describes the hall in *Eldorado*, 149: "it [the stone] is of a fine yellow color, easily cut, and will last for centuries in that mild climate. The upper story in which the Convention sat, formed a single hall about 60 feet in length by 25 in breadth. A railing running across the middle divided the members from the spectators. The former were seated at four long tables, the President occupying a rostrum at the further end, over which were suspended two American flags and an extraordinary picture of Washington, evidently the work of a native artist."

[5] The Governor's proclamation of June had fixed the apportionment, but on account of the subsequent change in relative population, he now recommended, through Secretary of State Halleck, a delegate, "that additional delegates be received from some of the large and more populous districts." Browne's *Deb.*, 8.

For the office of President there was considerable canvassing, the leading names mentioned being Dimmick, Boggs, Semple, Foster, Snyder, and Gwin. Numerous candidates presented themselves for the Secretaryship.[1] Dr. Robert Semple, of Sonoma, was duly elected President, and in his brief address he struck the key-note of the Convention: "We are now, fellow citizens," said he, "occupying a position to which all eyes are turned. . . . It is to be hoped that every feeling of harmony will be cherished to the utmost in this Convention. By this course, fellow citizens, I am satisfied that we can prove to the world that California has not been settled entirely by unintelligent and unlettered men. . . . Let us, then, go onward and upward, and let our motto be, 'Justice, Industry, and Economy.'"[2] Organization was completed by the election of subordinate officers, William G. Marcy being elected Secretary, and J. Ross Browne, Reporter.

Here was a unique Constitutional Convention. Several nationalities were represented, but members of American birth were in the majority, and it was to frame an American constitution that the delegates had come together. The Convention was a body of men, not of national reputation or extraordinary learning, but disinterested, competent, and earnest. The body was raised above national prejudice and local interests by the honest and patriotic purpose which animated it.[3] The personnel included many of those already most conspicuous by their endeavors to establish the commonwealth of the Pacific:[4] the Constitution of 1849 was not the sudden creation of unintellectual gold hunters; it was made possible only by the men of sense and by the controversies of the interregnum.[5]

The framers of the Constitution undertook their grave task amid extraordinary embarrassments and difficulties. The

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[1] *Alta Cal.*, September 13, 1849. [2] Browne's *Deb.*, 18.
[3] Colton, *Three Years in California*, 410.
[4] *Cf. Daily Evening Post*, [S. F.] June 22, 1878, I, 2.
[5] *Cf.* Royce, *Cal.*, 199.

three leading classes of the population of California, *viz.*, the native Californians, the earlier English-speaking settlers, and the miners, held such divergent sentiments and were such utter strangers to one another, that it might well seem an impossible task to bring them to an agreement upon the fundamental law of an incipient State. General discussion and a common understanding had been impracticable. It may be doubted if the members of any previous convention in the United States, with similar purpose, ever came together so totally unacquainted with each other and so entirely wanting in general concert of plans or policies of action.[1] This much, however, they were agreed upon,—that their task was to frame a constitution for the recently conquered and now almost wholly unorganized territory of California: by virtue of this constitution's conformity with the doubtful wishes of Congress, the province, of vague boundary and in a highly distracted condition, was to seek admission into the American Union. Recent contests in Congress of unwonted violence and repeated failure to legislate, left no doubt that the situation was extremely delicate and would demand the utmost skill.

The difficult task fell to a body of perhaps the youngest men that ever met for similar purpose.[2] Mr. Botts was "impressed with the absence of those gray hairs which he had seen in assemblies of this solemn character in the older States."[3] There was great dearth of books of reference in Monterey during the session of the Convention. It was believed that there were not above fifty volumes of law or history in all the town.[4] Considerable inconvenience resulted

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[1] Willey, *Constitutional Convention; Ov. Mo.*, IX, 14.

[2] Fitch, in *Century*, XL, 786.

[3] Browne's *Deb.*, 27–8. The average age of delegates was 36 years. Carrillo, aged 53, was the oldest; Jones and Hollingsworth, aged 25, the youngest.

[4] Botts, in Browne's *Deb.*, 274. Lucia Norman (Youth's *History of Cal.*, 141) extravagantly says that "copies of the State Constitutions of Iowa and New York were the only ones that could be obtained!" But precedents were not so scarce. Many State Constitutions were used, and frequently mentioned in the debates: and see Ord's remark in Convention; he "had looked over the whole thirty Constitutions." Browne's *Deb.*, 36.

from the want of a printing press, and the burden of the secretaries was correspondingly heavy until the adoption of a favorable resolution.[1]

The foundations of the new commonwealth were laid under adverse circumstances, yet with signal ability.[2] The Convention commanded respect as a dignified and intellectual body of earnest, honest men who did honor to California.[3] Only through the largest concessions could unanimity be reached.[4] The dignity of the occasion, the gravity of the task, and the importance of the result were appreciated by the delegates. Mr. Gilbert gave expression to a common sentiment when he declared: "The people will consider our acts in this Convention, and if they ratify them, those acts will go before the Congress of the United States, . . . and before all the nations of the world."[5]

The Hispano-Californian delegates, seven in number, were treated with a high degree of respect, and to them were extended special courtesies.[6] The proportion of native Californians to the Americans was about equal to that of the respective populations.[7] General Vallejo, a man of commanding presence and dignified expression, was better acquainted with American institutions and laws than any of his kin. Of good Spanish family, educated and liberal, he enjoyed great popularity and was for years after the Convention known as "the most distinguished of living Hispano-Californians."[8]

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[1] Browne's *Deb.*, 38.

[2] *Cf.* Editorial in *Bulletin* [S. F.], May 23, '78, II, 1.

[3] *Cf.* Frost, 125; Browne, *Anniversary of Territorial Pioneers*, p. 56; Taylor, *Eldorado*, 148–150; etc.

[4] "No cloud ever cast its shadow on equal incongruities grouped in cliffs and chasms, pinnacles and precipices, without having it broken into a thousand fragments." Colton, *Three Years in California*, 410.

[5] Browne's *Deb.*, 149–150; *cf.* 58, 122, 141, 371, 424, 434.

[6] *Ibid.*, Bott's remarks, 371; *et passim.* [7] *Cf.* Taylor, *Eldorado*, 148.

[8] Shuck, *Repres. Men of the Pacific*, 225, *et seq.*; *cf.* Taylor, *op. cit.*, 157; Fitch, *Century*, XL, 787; etc.

Perhaps none was more accomplished or better educated than De la Guerra, of Santa Barbara, who afterwards became a State senator. Carrillo was a pure Castilian, of strong character, intelligent, and somewhat prejudiced against Americans. Pico's face was expressive of shrewdness and mistrust. These, with Castro, a man of stout frame and handsome face, Dominguez, and Covarrubias, comprised the native Californians. Pedrorena was a native of Spain. Of the other foreign born delegates, Captain Sutter, a Swiss, stood prominent. One of the earliest of the pioneers, universally known for his fort at Sacramento, he was a man "of good intellect, excellent common sense, and amiable qualities of heart."[1] Shannon, a native of Ireland, showed ability as a lawyer: he it was that introduced into the Declaration of Rights the section against slavery. The voices of Sansevaine, of Bordeaux, and Reid, of Scotland, were scarcely heard on the floor of the Convention.

It would be out of place here to particularize at length regarding the Americans. Many incessant toilers were among them, and few had come with ulterior ambitious schemes. Gwin, however, a Southerner of education and experience, seems to have come to California for the express purpose of seeking election to the United States Senate. He had served in Congress, had attained prominence in the Texas agitation, and had sat in the recent Constitutional Convention of Iowa. His experience in deliberative assemblies and knowledge of parliamentary usage gave him superior advantage;[2] and his ability in debate, added to marvelous powers of leadership, gave him exceptional authority as the ablest politician in the Convention. Other Southerners who figured conspicuously were McCarver, lately an Oregon farmer; Botts, a Virginia lawyer and good debater; Jones, one of the youngest mem-

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[1] Taylor, *op. cit.*, 158.

[2] On Gwin, see Phelps, *Contemp. Biog. of Cal's. Rep. Men*, I, 31; Fitch, *op. cit.*, 784–5; Bancroft, VI, 291; etc.

bers of the Convention and of short residence in California; Wozencraft, a genial physician of scholarly habit; and Moore of Florida, whose profession is set down as "elegant leisure." Three of the most assiduous workers were Captain Halleck, Riley's Secretary of State, who had rendered invaluable service in preparing the way for the Convention,[1] and who since became famous as lawyer, author, and general; Gilbert, the able young editor of the *Alta California*, to whom the people of San Francisco were indebted for excellent reports of the Convention's labors; and Dimmick, a New York lawyer of three years' residence in California. Lippitt, Norton, and Steuart will be remembered as leading members of the so-called San Francisco Legislative Assembly, of good ability, and earnest advocates of good government. Larkin is known as the "first and last American Consul to California."[2] Robert Semple, a five years' resident of the territory, proved himself a dignified and competent President of the Convention.

It is obvious that no such assembly of men could in any country be called together without representing a great diversity of views and sentiments. The object for which they had met was known to be of profoundest significance in relation to the one overshadowing question of national politics, the most antagonistic phases of which had their adherents in the Convention. Even the most violent Southerners, however, had little or no desire to see slavery then introduced into so unfavorable a community.[3] As the Convention proceeds, therefore, ulterior designs begin to appear, and intimation of political duplicity is not entirely wanting. The debates on the boundary question betray the artifice employed by some leading members. Yet, in general, the Convention proved its own sufficient corrective, and the resultant action was seldom unwise.

The first regular session was "opened with prayer to Almighty God for His blessing on the body, in their work,

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[1] Willey, in *Overland Mo.*, July, 1872.

[2] *Daily Evening Post*, June 22, 1878, I, 2.

[3] *Cf.* Royce, *Cal.*, 265.

and on the country."[1] On the following day provision was made whereby the Convention should be opened each day with prayer. The clergy of Monterey, consisting of Rev. Padre Antonio Ramirez and Rev. S. H. Willey, were requested to act as chaplains; and it was unanimously agreed "That the officiating clergy of this House be admitted to the privileged seats of the House."[2]

The President being duly sworn by the Secretary of State, he administered the oath to the members. The important preliminary question whether the assembly should proceed to form a State or a Territorial Government engaged the Convention but briefly, when by a strong vote State organization was decided upon.[3] The few who opposed State organization were for most part either native Californians or old and conservative settlers. Gwin observed, in a subsequent debate, that those members voting against State organization represented the districts south of 36° 30′, and that the "Representatives here from that region are unanimous in their votes against the establishment of a State Government."[4] He thus without sufficient warrant insinuated the identity of the slave interests with the desire of delegates from the southern districts. The popular sentiment favoring the formation of a State had increased with remarkable rapidity, and for several months the organization as a Territory under the United States Constitution had scarcely with seriousness been thought of.[5]

The machinery of the House was completed by the appointment of a Committee on the Constitution, of two members from each of the ten districts represented, with Myron Norton as chairman;[6] and a Committee on Rules and Regulations of five members.

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[1] Willey, *Constitutional Convention.* [2] Browne's *Deb.*, 54.

[3] *Ibid.*, 23. The vote was 28 to 8. [4] *Ibid.*, 197.

[5] See King's Report, Ex. Doc. 1 S., 31 C., H. R., VIII, 59. This is quoted from at length in Frost's History, 118, *et seq.*

[6] Browne's *Deb.*, 30. Bancroft seems to have committed the error of supposing Gwin chairman because first named. See his note in *History*, VI, 290.

On the day after its appointment the Committee on Constitution, without having had proper time for deliberation and reflection,[1] reported a very unoriginal Declaration of Rights of sixteen sections. After sundry changes, usually of an unimportant nature, had been made, Shannon of Sacramento, in accordance with a pledge previously given to his constituents, moved to insert, as an additional section: "Neither slavery nor involuntary servitude, unless for punishment of crimes, shall ever be tolerated in this State."[2] Surprising as it may at first appear, this vital section was, almost without debate, unanimously adopted. The preponderance of sentiment in the Convention—much more in the territory at large—was undoubtedly in favor of a free State; but that not a vote was recorded for slavery is matter for wonder, for fifteen members had emigrated from slave States.[3] It is impossible to believe that the vast national bearing of this decision was then fully appreciated. It is hardly inaccurate to affirm that it was the "pivot-point with the slavery question in the United States."[4] The institution of American slavery had passed the zenith of its power, and henceforth was destined steadily to decline. The great Commonwealth of California, entering the Union as the sixteenth free State, forever destroyed the equilibrium between North and South.

The unanimous vote for a free State, however, by no means put at an end the question of slavery in all its phases. One of the most exciting discussions was on a section, introduced by McCarver, prohibiting the entrance of "free persons of color" into the State. Slave holders, it was urged in defense of the section, would bring their slaves to California and free them in great numbers for brief service in the gold mines.[5]

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[1] *Cf.* Norton's remarks, Browne's *Deb.*, 34. [2] *Ibid.*, 43.

[3] Willey, quoted in *Sacramento Record-Union*, Sept. 9, 1884, I, 4; *cf. Bulletin* [S. F.], May 23, '78, II, 1.

[4] Willey, *Constitutional Convention; cf.* Willey, *Thirty Years in Cal.*, 31–32.

[5] Browne's *Deb.*, 138.

They would be a burden on the community,[1] and degrade white labor;[2] for they are not only most wretched, ignorant, and depraved beings,[3] but idle, disorderly, and unprofitable.[4] It would be impossible to unite free and slave labor: the two races "can never intermingle without mutual injury."[5] On the other hand, members were asked to remember that the Constitution emanating from this Convention was "to be subjected to the scrutiny of all the civilized nations of the earth:" "let it not be said that we have attempted to arrest the progress of human freedom."[6] The Declaration of Rights adopted excludes slavery: is it not inconsistent to debar any race of men from a free State?[7] "Let Africans be placed upon the same footing with natives of the Sandwich Islands, Chileans, and Peruvians, and the lower classes of Mexicans."[8] A freeman should not be denied the rights "which you award to all mankind."[9] There are many free negroes in New York who are intelligent, shrewd, respectable citizens.[10] Let the Legislature make whatever laws it sees fit: this Constitution should not provoke discussion in Congress, and thus "jeopard the interests of California."[11] McCarver's proposition was adopted in Committee of the Whole,[12] but after further consideration in Convention, the proposed section was defeated by a large vote.[13]

When the section on Corporations came under consideration, a most extraordinary opposition to banks was manifested. Botts, fearful that some member desired "to steal through this House a bank in disguise," avowed his chief object to be "to crush this bank monster." He recalled the "desolating operations" of 1836–37, and urged that no loop-hole be left, for then "this insinuating serpent, a circulating bank, will find its way through."[14] Price argued for a sound currency

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[1] Browne's *Deb.*, 138. [2] *Ibid.*, 143, 145. [3] *Ibid.*, 144.
[4] *Ibid.*, 145. [5] *Ibid.*, 147, 152. [6] *Ibid.*, 141, 149.
[7] *Ibid.*, 143. [8] *Ibid.*, 141, 150. [9] *Ibid.*, 149.
[10] *Ibid.*, 143. [11] *Ibid.*, 143, 146, 150. [12] *Ibid.*, 152.
[13] *Ibid.*, 339. The vote was 8 to 31. [14] *Ibid.*, 125.

to secure the stability of trade. The nation had recently been subjected to the most trying experience by reason of this "monster serpent, paper money:" "Let us provide then the strongest constitutional guards against the vicissitudes which we know the people of the United States have suffered."[1] Lippitt offered an amendment which stripped the section of its more objectionable features, which being accepted, the section was adopted. Corporations were to be formed under general laws, "but shall not be created by special act, except for municipal purposes."[2] Little real disagreement had been shown, and a large part of the discussion was based on mere suspicion and prejudice against banks.[3]

To provide a satisfactory and just system of taxation for such a commonwealth as California was obviously difficult. The large Californian land holders of the south objected—not without reason—to a tax which, though nominally equal, they feared would fall almost wholly upon them, while the great shifting population of the north and in the mines would enjoy the benefits of a government supported by the few. The difficulty was overcome in part by Jones' amendment providing that assessors and collectors should "be elected by the qualified electors of the district, county, or town in which the property taxed for State, county, or town purposes, is situated."[4]

Considerable interest was manifested in the question of separate property for married women.[5] Many of the arguments are amusing, and they throw a side-light on the social status of the country. The husband, at the time of marriage, argued Lippitt, is supposed by common law to come into possession of the wife's property and is thus made responsible for her debts.[6] Let us not experiment in this Constitution. This question is proper subject for legislative enactment.

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[1] Browne's *Deb.*, 113. [2] *Ibid.*, 129. [3] *Cf. Ibid.*, 130, 132.
[4] *Ibid.*, 364–376. [5] *Ibid.*, 257–269.
[6] *Ibid.*, 262. Lippitt declares: "I am wedded to the common law." *Ib.*, 260.

Botts descanted upon the frailty of woman and the evils of woman's rights, and was for expunging the section from the Constitution.[1] But Norton denied the relevancy of both common and civil law,[2] and Dimmick pointed out that "women now possess in this country the right which is proposed to be introduced in this Constitution;" it is no experiment here.[3] It was further argued that such a provision would be a safeguard, for men will wildly speculate in California; and the gallant Captain Halleck, "not wedded either to the common law or the civil law, nor as yet, to a woman," conceived that it would be a great "inducement for women of fortune to come to California."[4] The section as proposed, granting the wife power to hold separate property, was finally adopted. This is believed to be the first time that a section recognizing the wife's separate property was embodied in the fundamental law of any State. Kindred sections were those prohibiting the Legislature from granting any divorce and requiring it to enact a homestead law.[5]

The debates on education showed a warm interest in the subject and great unanimity in favor of establishing a well-regulated system of common schools. No one could foretell positively what Congress would do; but assuming that in the matter of lands Congress would be as bountiful as it had been to Oregon and Minnesota, a liberal provision was made for public education; and with excellent foresight the Convention set apart the income of lands for the establishment of a State University.[6]

In the settlement of the Judiciary, the main point of disagreement was as to the monetary limitation of the jurisdiction of the Appellate Court. After a debate which roused considerable excitement, an amended section was adopted giving

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[1] Browne's *Deb.*, 259–60. [2] *Ibid.*, 265–6. [3] *Ibid.*, 262–3.
[4] *Ibid.*, 259. [5] Art. IV, § 26, and Art. XI, § 15.
[6] Browne's *Deb.*, 202–211; *cf.* Bancroft, VI, 298; *Evening Post* [S. F.], June 29, '78, II, 6.

the Supreme Court "appellate jurisdiction in all cases when the matter in dispute exceeds $200.00."[1] A minor but lively discussion arose upon the section instructing judges not to charge juries with respect to matters of fact; but the objections were overcome, and the section adopted.[2] The Judiciary was made elective, and consisted of Supreme Court, District Courts, County Courts, and Justices of the Peace.

By far the most animated debate of the entire Convention, a debate which assumed a character of real interest and profound significance, was that upon the question of boundary.[3] This contest, the longest and most strictly sectional of the session, came dangerously near to wrecking the Constitution. California, as a Mexican province ceded to the United States, was of vast but not strictly defined territorial extent, embracing the great desert east of the Sierra Nevada and the fertile district inhabited by Mormons. The parallel of 42° formed the northern boundary;[4] the Pacific ocean formed the natural boundary on the west; and the line between Upper and Lower California, conformable to the treaty of Guadalupe Hidalgo, the boundary on the south: thus the great point in dispute was the eastern boundary line.

On September 18, the Committee on the Boundary, through Chairman Hastings, made its report, which was referred to the Committee of the Whole.[5] Its opinion was that the extent of Mexican California, then estimated at 448,691 square miles, was entirely too vast for one State; and the eastern boundary recommended was the intermediate one of

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[1] Browne's *Deb.*, 233. [2] *Ibid.*, 234–9.

[3] Besides the full report of this contest in Browne's *Debates*, several short accounts are to be found. Some of these are Taylor, *op. cit.*, 152–4; *Evening Post* [S. F.], June 29, 1878, II, 5; Hittell, II, 766–8; Bancroft, VI, 291–6. See also Lippitt, *Century*, XL, 794–5; Vassault, *Overland Monthly*, XVI, 290, *et seq.*

[4] Established by treaty with Spain, Feb. 22, 1819. See *Treaties and Conventions*, 1017.

[5] Browne's *Deb.*, 123–4.

the 116th parallel. The debate opened in the morning session of September 22 and continued till late at night.[1] Sundry amendments, fixing as the eastern boundary various lines, were proposed and considered. The disagreement was complete and apparently irreconcilable.

The main argument centred about the controversy between the party favoring the widest or full extent of territory and the party that wished to prescribe narrow limits. Gwin at once took a leading part in the contest by his amendment favoring the large extent. In defense of this it was urged that the Convention had met to form a Constitution for the whole of California, and it was not in its province to dismember the State.[2] If the limit be placed at the Sierra Nevada, where were the inhabitants beyond, especially the thousands of Mormons, to seek justice? These should be included for protection; and besides, there might be vast wealth in this great extent of territory.[3] But, on the other hand, Semple argued that "it is evidently not desirable that the State of California should extend her territory further east than the Sierra Nevada," the great natural boundary.[4] Such an immense territory as that proposed would be unwieldy, and could never be subjected to the operation of our laws. The great distances would require the legislators months of travel to reach the capital. Moreover, the thousands of inhabitants at the Salt Lake have no representation in this Convention and no recognition in the Governor's proclamation: they cannot, therefore, be compelled to come within the State of California.[5] California has no more right to include all this territory than Louisiana did all the territory known as Louisiana.[6] The South in Congress will not permit a State to settle the question of slavery for territory as large as all the Northern States in the Union:[7] whereas it is "clear that

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[1] Browne's *Deb.*, 167–200.
[2] *Ibid.*, 186, 188.
[3] *Ibid.*, 175, 178–9, 193.
[4] *Ibid.*, 168; *cf.* 182.
[5] *Ibid.*, 170–1, 185, 191; *cf.* 421.
[6] *Ibid.*, 187.
[7] *Ibid.*, 173.

that question is settled beyond dispute, if we establish a reasonable boundary."[1]

A minor controversy, deemed to be conciliatory to the main issue, was on the expediency of leaving the question of boundary open, for settlement in Congress. Halleck's proviso to Gwin's amendment, that the Legislature should have power to accede to any proposition of Congress limiting the boundary to the Sierra Nevada,[2] met with little opposition from advocates of the larger boundary. A vital consideration was the immediate admission of the State by Congress: keep the question of slavery out of Congress, said Sherwood, by taking all the territory and leaving Congress to cut it off at the Sierra Nevada if it wishes.[3] But, replied Semple, "Congress has no right to dismember us; and if she does, it can only be with the consent of our Legislature."[4] And Hastings urged that an open boundary meant the open question of slavery, which, in turn, precluded the possibility of a State Government for several years, whereas the great object was to secure speedy admission into the Union.[5]

Thus the debate continued; many members participated. It is evident that members had a very vague conception of the real extent of the territory they were endeavoring to include in the State.[6] Probably none of the advocates of the larger boundary entertained the thought or desire that California would long retain all the territory described. And in this seems to lie the explanation why Gwin's amendment was adopted[7] in Committee of the whole: Halleck's proviso greatly mollified its rigidity.

The actual bearing of the slavery question in the boundary discussion was tardily manifested: it was at first touched shyly and with great apparent reluctance. But as the debate proceeded, and more especially when the Committee's report was

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[1] Browne's *Deb.*, 177. [2] *Ibid.*, 169; *cf.* 175.
[3] *Ibid.*, 181–2. [4] *Ibid.*, 176. [5] *Ibid.*, 173.
[6] *Cf. Ibid.*, 176, 180, 194. [7] *Ibid.*, 200.

taken up in Convention,[1] the real importance and application of the question began to be recognized, and sinister motives were charged. "It is a question," declared Tefft, "in comparison with which, everything else that has been argued here, is trifling. I believe gentlemen will see when our Constitution comes to be considered in the halls of Congress, that it is a matter of vital importance, not to California alone, but to our whole Confederacy."[2] The ulterior design of the pro-slavery members was, there is little reason to doubt, to make the State so large as to insure a subsequent division, by an east-and-west line, into two large States, of which the southern was to be organized as a slave State.[3] It is plain, however, that not all those voting for the larger boundary were parties to this duplicity. The people of California had declared positively against slavery, the Convention had unequivocally pronounced against it: it is not remarkable, therefore, that the friends of slavery fought with the utmost vigor for such vast territory as would necessitate a division. This was their last hope of forming a new slave State from the acquired territory of the Pacific.

The question being resumed in Convention on October 8, Hastings' substitute, proposing an intermediate line running through the midst of the Nevada desert, was quickly adopted, and ordered engrossed for third reading. But McDougal's motion to reconsider the motion to engross reopened the discussion and ended in a reconsideration of Hastings' proposition. The advocates of the Sierra Nevada boundary were now confident of success, but great was their consternation when the report of the Committee of the whole was again concurred in. Upon the announcement of the vote, the utmost excitement and confusion prevailed.[4] The wrecking of the entire work of the Convention was narrowly averted.

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[1] Oct. 8, Browne's *Deb.*, 417–458. [2] *Ibid.*, 424.
[3] Lippitt, in *Century*, XL, 794–5; *cf.* Vassault, *Overland Mo.*, XVI, 290.
[4] *Ibid.*, 441; *cf.* Taylor, *Eldorado*, 152–4.

The activity of the defeated party, however, secured a second reconsideration on the following day, for the section had not yet been engrossed. The motion to engross was finally lost, and the proposition of Jones, fixing the present boundary, was adopted by a large majority.[1] Thus was settled the most vexed and exciting question of the Convention, the boundary controversy.

Other sections that elicited discussion of an interesting character were those two, essentially ethical, prohibiting lotteries and forbidding duels. Both sections were adopted as reported, and incorporated in the Constitution.[2] Ord's curious proposition, that no "clergyman, priest, or teacher of any religious persuasion, society, or sect, shall be eligible to the Legislature," quickly fell under the ridicule of Hastings, who moved to insert the words, "Lawyers, physicians, or merchants," and of Shannon, who asked the gentleman to be so good as to introduce "miners" into his list.[3] It was quite generally understood that San José should be the permanent seat of the new government, but a lively controversy arose from the competition of the different localities for the first session of the Legislature. The advantages of no fewer than seven towns[4] were urged, but the controversy ended by adopting the committee's proposition and selecting San José.[5] A section of the Schedule which gave rise to some contention was that on the apportionment of representation for the State Legislature.[6] The real contest was occasioned by the nature of the population in the different sections, especially in the mining region, where, it was claimed, the population was exceedingly transitory. Members dilated upon the great numbers of their respective constituents, and sought for them the largest representation permissible.

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[1] Browne's *Deb.*, 458. [2] *Ibid.*, 90–93 and 246–255. [3] *Ibid.*, 136–7.

[4] San José, San Francisco, Monterey, Benicia, San Luis Obispo, Santa Barbara, and Stockton.

[5] Browne's *Deb.*, 239–246. [6] *Ibid.*, 404–416.

The Great Seal of the State, adopted after a short but interesting debate, was believed to be, as symbolic of the new State, very appropriate. The work was presented to the Convention by Caleb Lyons, but the real designer was afterward found to be Major Garnett.[1] Minerva, full grown from the brain of Jupiter, stands in the foreground, while at her feet crouches a grizzly bear feeding upon grape clusters. At his side stands a miner with rocker and bowl. Ships are seen on the waters of the Sacramento, and the snowy peaks of the Sierra Nevada form a fitting background. The legend "Eureka" is surmounted by thirty-one stars, the last representing the new State of California.

[1] Browne's *Deb.*, 304, 322–3, 466–7; *cf.* Hittell, II, 773.

CHAPTER IV.

The Constitution Completed.

The Constitutional Convention completed its labors on Saturday, October 13, 1849, under circumstances highly dramatic. With the dawning of that day of beauty and sunshine dawned a new era for California.[1]

The day and night preceding the final adjournment exceeded in social interest the Convention's entire previous term of existence. An elaborate ball was given on the last night, and all were brought to a happy and congratulatory mood.[2] The perplexing questions of the Convention were all settled, and throughout the various elements of the heterogeneous assembly there was evolved a general harmony.

The members had, after some disagreement, voted themselves compensation at the rate of $16.00 per day and $16.00 for every twenty miles of travel; and the President's per diem was fixed at $25.00.[3] In view of the times and opportunities this was moderate. The officers of the Convention were liberally provided for, their per diem allowance ranging from Secretary, $28.00, to Page, $4.00.[4] The sum of $10,000 was voted to J. Ross Browne, stenographic reporter,

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[1] Bayard Taylor's contemporaneous account of the Closing Scenes of the Convention (*Eldorado*, 158–167) is most interesting and valuable. Gilbert's editorial on Signing the Constitution (*Alta Cal.*, Nov. 22, 1849) is rich in detail, eloquent and patriotic. *Cf. Sacramento Union*, Sept. 9 and 12, 1859; Shuck, *California Scrap Book*, 67.

[2] Taylor, *op. cit.*, 158, *et seq.*

[3] Browne's *Deb.*, 289–92.

[4] *Ibid.*, 107, 363–4.

his contract being to furnish 1000 printed copies of the entire proceedings in English and 250 in Spanish.[1] General Riley was voted a salary of $10,000 per annum during his continuance in office as Executive, and Captain Halleck, $6,000 per annum, as Secretary of State.[2] It was ordered that certified copies of the Constitution in English and Spanish be presented to the Executive, and that 8,000 copies in English and 2,000 copies in Spanish be printed and circulated.[3] The valuable services of Honorable Robert Semple, President of the Convention, were duly recognized[4] by the unanimous adoption of a vote of thanks; and the kindness and courtesy which marked the intercourse of General Riley with members were likewise remembered. Provision was made for the transmittal to General Riley of a copy of the Constitution, with the request that he forward the same, at the earliest opportunity, to the President of the United States.[5] Mr. Hamilton was employed for five hundred dollars to engross the Constitution upon parchment.[6] The rhetorical, optimistic Address to the People, presented by Steuart, was unanimously adopted,[7] and all was in readiness for the formal signing of the Constitution.

"At a few minutes past three, preliminary matters having been disposed of, the delegates commenced the signing. Scarcely had the first man touched his pen to the paper when the loud booming of cannon resounded through the hall. At the same moment the flags of the different Head-Quarters, and on board the shipping in the port, were slowly unfurled, and run up. As the firing of the national salute of *thirty-one* guns proceeded at the fort, and the signing of the Constitution went on at the hall, the captain of an English bark then in port paid a most beautiful and befitting compliment to the occasion and the country, by hoisting at his main the American flag above those of every other nation, making, at the moment that the thirty-first gun was fired, a line of colors from the main truck to the vessel's deck. And when, at last, that thirty-first gun

[1] Browne's *Deb.*, 163–4. [2] *Ibid.*, 476. [3] *Ibid.*, 462. [4] *Ibid.*, 473–4.
[5] *Ibid.*, 473. [6] *Ibid.*, 475. [7] *Ibid.*, 474–5.

came—the FIRST GUN FOR CALIFORNIA!—three as hearty and as patriotic cheers as ever broke from human lips, were given by the Convention for the New State."[1]

A most affecting part of the day's proceedings occurred after the Convention had adjourned *sine die*. The members in a body repaired to General Riley's house, where, after a cordial greeting, the pioneer among pioneers, Captain Sutter, on behalf of the Convention, expressed gratitude for the aid and coöperation given by the Executive. The General's reply was "a simple, fervent, and eloquent recital of a patriotic desire for the good of California,"[2] concluding with a rare tribute to his Secretary, Captain Halleck.

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[1] *Alta Cal.*, Nov. 22, 1849.

[2] *Ibid.* I quote these brief addresses from Browne's *Deb.*, 476–7. Sutter to Riley: "General: I have been appointed by the delegates elected by the people of California to form a Constitution, to address you in their names and in behalf of the whole people of California, and express the thanks of the Convention for the aid and coöperation they have received from you in the discharge of the responsible duty of creating a State Government. And, sir, the Convention, as you will perceive from the official records, duly appreciate the great and important services you have rendered to our common country, and especially to the people of California, and entertains the confident belief that you will receive from the whole people of the United States, when you retire from your duties here, that verdict so grateful to the heart of every patriot: 'Well done, thou good and faithful servant.'"

Riley's reply: "Gentlemen: I never made a speech in my life. I am a soldier—but I can *feel;* and I do feel deeply the honor you have this day conferred upon me. Gentlemen, this is a prouder day to me than that on which my soldiers cheered me on the field of Contreras. I thank you all from my heart. I am satisfied now that the people have done right in selecting delegates to form a constitution. They have chosen a body of men upon whom our country may look with pride; you have formed a constitution worthy of California. And I have no fear for California while her people choose their representatives so wisely. Gentlemen, I congratulate you upon the successful conclusion of your arduous labors; and I wish you all happiness and prosperity." After interruption by cheers he concluded: "I have but one thing to add, gentlemen, and that is, that my success in the affairs of California is mainly owing to the efficient aid rendered me by Captain Halleck, the Secretary of State. He has stood by me in all emergencies; to him I have always appealed when at a loss myself; and he has never failed me."

The Constitution was completed, and California was already a State. The Americans were proud to have erected a great Commonwealth on the shore of the Pacific; the delegates of whatever nationality had become *Californians;*[1] the native members joined in the spirit of the occasion, and were at last convinced that "they were conquered but to become the brothers and friends of the conquerors."[2]

The first Constitution of California was not one of those documents that "spring full-armed from the heads of Olympian conventions:"[3] it was not pretended indeed to originate a constitution, but from existing chaos to create a system of fundamental law by selecting from all republican forms of government the good and applicable.[4] Gwin, with politic foresight, had brought with him a copy of Iowa's Constitution of 1846, and this he proposed as a model for the present Constitution.[5] For a time, since there was great dearth of reference books, it seemed as though this model might be closely followed. But other State Constitutions were obtained, and that of New York soon became a favorite.[6] The authority of the various State Constitutions very naturally had a most important influence with the Convention,[7] although some members had an aversion to precedents and desired to create a constitution having an original stamp.[8] Hastings proposed the Constitution of the United States as a guide, since he urged, "the record of the debates on that Constitution embraced the principles of all the State Constitutions."[9] Notwithstanding the scarcity of reference books, precedents, either directly or indirectly consulted, were very numerous. Ord had seen the entire thirty State Constitutions;[10] and

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[1] *Cf.* Address to the People, Browne's *Deb.*, 474.
[2] *Alta Cal.*, Nov. 22, '49; *cf.* Taylor, *Eldorado*, 166.
[3] Jameson, *J. H. U. Studies*, IV, 196.
[4] *Cf.* Gwin's remark, Browne's *Deb.*, 116. [5] *Ibid.*, 24.
[6] *Cf. Evening Post* [S. F.], June 22, 1878, I, 3.
[7] *Cf.* Shannon, in Browne's *Deb.*, 143.
[8] *Ibid.*, 33, 51, 379. [9] *Ibid.*, 28. [10] *Ibid.*, 36.

besides constant reference to individual States,[1] the English Constitution and the Mexican law were cited.[2]

The Declaration of Rights reported by the committee consisted of sixteen sections, the first nine of which were copied from New York and the last seven from Iowa.[3] The changes made were favorable to Iowa, but in general the article, with the addition of several sections, was approved as reported. The influence of the Constitutions of New York and Iowa is easily apparent in almost every article of California's Constitution: other States, as Michigan, Virginia, Louisiana, and Mississippi, while leaving an influence, are not at all to be compared to the two great models. An evidence of the Convention's wisdom is its close adherence to well selected models, embodying fundamental laws and principles whose soundness had been thoroughly tested. It would have been extremely hazardous and probably disastrous for an assembly of such heterogeneous personnel, many of the delegates being unused to legislation, to venture upon really new constitution making.

Yet a high order of skill was required to bring to completion a satisfactory Constitution for a commonwealth whose history was absolutely unique and whose early admission into the Union was seen to be extremely doubtful. It was fortunate that the Convention was ruled by no demagogue, no faction, no party. The mixed character of the personnel proved a safeguard.[4] The claims of Northern sentiment and

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[1] Browne's *Deb.*, 24, 31, 34, 36, 50, 143, *et passim.*

[2] *Ibid.*, 36, and 37, 314, *et passim.*

[3] It is commonly stated, following Gwin's remark (Browne's *Deb.*, 31) that eight sections were copied from each State. A comparison of documents shows the error. Section 9 of California is an exact copy of Section 10 of New York and does not appear in Iowa's Declaration of Rights. The divorce and lottery clauses, however, are to be found in Article III, Sections 28–29 of Iowa's Constitution. For the Constitution of '46 of New York, see Poore's Charters and Constitutions, 1351, *et seq.* Poore has omitted Iowa's '46 Constitution, reprinting by mistake the Constitution of '57. *Cf. Ib.*, 537 *et seq.*, and 552, *et seq.* Iowa's '46 Constitution is in Parker, *Iowa As It Is* [1856], pp. 207–234.

[4] *Cf.* Bancroft, VI, 303.

Southern chivalry had to be regarded; ardent Americans, fresh from "the States," were tempered by older pioneers and Hispano-Californians; all were compelled to submit to repeated compromise, and thus a moderate, judicial and workable Constitution was created.

The achievement illustrates the great capacity of the American people for self-government. The Constitution offered to the citizens of California for their consideration and their votes sprang immediately into great favor, and the members of the Convention were warmly praised for having done their work faithfully and "adjourned with unimpaired good will."[1] The document received the highest commendations from all sources, as the "embodiment of the American mind, throwing its convictions, impulses, and aspirations into a tangible, permanent shape."[2]

It does not lie within the province of this paper to present a detailed analysis of California's first Constitution; its salient features have already been sufficiently indicated. It made California a free State. It was advanced, liberal, and thoroughly democratic: founded upon social and political equality, it was enlightened in its provisions for education and catholic in its guaranty of religious freedom. All political power was declared to be inherent in the people, and all officers of the government were made elective. Although the achievement of an assembly extremely heterogeneous and in the main unused to law making, it embodied the principles of the best political and jurisprudential philosophers; and, contrary to the expectation of some of its framers,[3] it endured for thirty years as the fundamental law of the

EMPIRE STATE OF THE PACIFIC.[4]

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[1] *Alta Cal.*, Oct. 25 and Nov. 1; *Placer Times*, Nov. 3, 1849. The Constitution was ratified by the people on Nov. 13 by an almost unanimous, though small, vote. The day was very stormy.

[2] Colton, *Three Years in Cal.*, 411. *Cf.* Von Holst, III, 463; Bancroft, VI, 302–3; Taylor, *Eldorado*, 148, *et seq.*; Frost, 125; Browne, *Am. Ter. Pioneers*, 56; Fitch, *Century*, XL, 787; M'Gowan's *Guide Book, Cal.*, 165, etc.

[3] Browne's *Deb.*, 129, 273.

[4] See *Alta Cal.*, Nov. 22, 1849.

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